IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1978

No. 78-1645

GRANT C. DAVIS and WILLIAM H. DAVIS as Trustee; THE ARIZONA BANK, as Trustee; and STEWART TITLE AND TRUST, as Trustee under Trusts Nos. 1094 and 1148

Petitioners,

v.

PIMA COUNTY, ARIZONA, a body politic; JOSEPH CASTILLO, E.S. "BUD" WALKER, RON ASTA, SAM LENA and CONRAD JOYNER, duly elected Supervisors in and for Pima County, Arizona; GLEN KNUTSON, Pima County Zoning Inspector; TRINI GOEBEL, CYRUS COOK, GEORGE HENDY, STANLEY KRZYZANOWSKI and CHARLES CAMP, members of the Pima County Board of Adjustment No. 3,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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Respondents Pima County, Arizona, a body politic; Joseph Castillo, E. S. "Bud" Walker, Ron Asta, Sam Lena and

Conrad Joyner, duly elected Supervisors in and for Pima County, Arizona; Glen Knutson, Pima County Zoning Inspector; Trini Goebel, Cyrus Cook, George Hendy, Stanley Krzyzanowski and Charles Camp, members of the Pima County Board of Adjustment No. 3, respectfully pray that a Writ of Certiorari not issue to review the Judgment and Opinion of the Court of Appeals of the State of Arizona, filed in this proceeding on October 11, 1978, as affirmed by the Arizona Supreme Court's denial of review of January 30, 1979.

REASONS FOR NOT GRANTING THE WRIT

1. The Arizona Court's Ruling that the Proper Remedy for Undoing a Wrongful Zoning Regulation is Invalidation, and not Damages, Is Not Contrary to the Established Rule of Law.

The Arizona Court of Appeals in the opinion below held that "...appellants' sole remedy was the undoing of the legislation and not money damages." _____ Ariz._____, 590 P.2d 459, 460 (Ariz.

App. 1978).

This is a zoning case. There was no evidence presented that distinguishes it from every other typical zoning case that could be litigated in the future. There was no finding that the Board of Supervisors of Pima County had any other intent than to regulate the use of land in a good faith attempt to protect the public health, safety and welfare through an exercise of the police power of zoning. Although urged to do so by the Petitioners, the trial court refused to find any intent by the Board of Supervisors to appropriate Petitioners' property for a public purpose or to find any bad faith on the part of the Board.

The decision of the Court below to declare the regulation invalid, but to withhold the remedy of monetary compensation, is in conformance with all federal and state precedents.

Petitioners asked for an award under the Fifth and Fourteenth Amendments guaranteeing that private property shall not be taken for public use without just compensation, but they never offered any evidence of what "public use" property was supposedly taken for.

Petitioners rely on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) for the proposition that police power regulation may, under some circumstances, so drastically interfere with the landowners substantive property rights as to compel compensation for a loss. The Supreme Court of the State of California has addressed this issue in the case of Agins v. City of Tiburon, _____Cal.3d_____, 153 Cal.Rptr. 224, 228,___ P.2d_____(1979). The court stated:

> In balancing the constitutional rights of the landowner against the legitimate needs

of government we do not ignore well established precedent. In Pennsylvania Coal Co. v. Mahon, (1922) 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, an injunction was sought to prevent a coal company from causing subsidence of property due to the company's underground mining activities. This Supreme Court opinion has generated some confusion and has even been cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases because of Justice Holmes' statement that 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' (Mahon, supra, at p. 415, 43 S.Ct. at P. 160.) It is clear both from context and from the deposition in Mahon, however, that the term "taking" was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land. The court did not attempt, however, to transmute the illegal governmental infringement into an exercise of eminent domain and the

possibility of compensation was not even considered.

Goldblatt v. Hempstead, 369 U.S. 590 (1962), further relied upon by Petitioners, merely restates the maxim in Pennsylvania Coal and finds it inapplicable to its facts, just as it is inapplicable to the facts in this case.

Petitioners further rely on Penn Central Transportation Company et al., v. New York City, et al., 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). This case is not even a zoning case but is rather one of a series of landmark preservation cases which have arisen in New York. It involves government regulation of existing uses which are alleged to be for the benefit of the public. This Court in Penn Central found there was no taking for the benefit of the public and without this appropriation, no "just compensation" was required.

> ...[T]he Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city.
>
> * * *
>
> This is no more appropriation of property by Government for its own uses than is a zoning law prohibiting, for "aesthetic" reasons, two or more adult theaters within a specified area, see Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), or a safety regulation prohibiting excavations below a certain level. See Goldblatt v. City of Hempstead, 104 U.S. 135; 57 L.Ed. 655.

Petitioners argue that under the rule stated by the Court of Appeals below, landowners will be deprived of any case-by-case factual analysis. They state on page 12 of their petition "Petitioners suggest that where Federal law compels a case-by-case inquiry into the facts, a state cannot constitutionally establish a blanket rule denying compensation in all cases, no matter what the facts." Respondents agree. A property owner is

entitled to, and in this case Petitioners received, an analysis of the facts to determine whether the action of the government went beyond a police power zoning regulation and entered the domain of taking for a public purpose for which compensation is the proper remedy. The holding of the Court below that this was a zoning case in which the proper remedy was invalidation, did not deprive Petitioners of any constitutional rights.

Petitioners reliance on other federal court decisions such as Donohoe Construction Company, Inc. v. Montgomery City Council, 567 F.2d 603 (4th Cir. 1977) and Foster v. City of Detroit, 254 F.Supp. 655 (E.D. Mich. 1966) affirmed 405 F.2d 138 (6th Cir. 1968), is misplaced. In both of these cases there was clear evidence of the local governments' intention to acquire property for public use through the institution of actual condemnation actions. In the Donohoe case, although

condemnation action had not yet been officially filed, it was undisputed that it was the intent of the City Council to later institute such an action. The Donohoe court at page 609 points out that Foster, supra, involved a "cloud of condemnation" that was imposed on a property for years by the government, which then refused to proceed with condemnation. In Donohoe, however, the claim of compensation for condemnation was denied because no such pattern of abuse was proven. In addition, an alledgedly improper downzoning was specifically denied as a proper basis for a claim for compensation. Supra, page 609.

Petitioners attempt to bolster their claim in inverse condemnation by reliance on Jacobson v. Tahoe Regional Planning Agency, 558 F.2d 928 (9th Cir. 1977). However, in that case no issues of inverse condemnation that could be relevant to this case were ruled upon. The Court

held that the defendants could not be sued for inverse condemnation because they did not possess the power of condemnation. The motion to dismiss which was denied by the Court involved only a denial of procedural due process, not the denial of substantive due process. Petitioners have never previously claimed at any stage of this litigation that they have been denied procedural due process. The record is replete with references to the many hearings before Pima County agencies such as the Board of Adjustment, the Planning and Zoning Commission, and the Board of Supervisors in which Petitioners were given the opportunity to exercise their procedural due process rights. As the Jacobson Court stated at page 936, in order for Petitioners to rely upon the rule of law in that case it would be necessary for them to establish "that their liberty or property interest have been invaded by the

government without an opportunity to challenge that invasion."

Although Petitioners cite Barbaccia v. County of Santa Clara, 451 F.Supp. 260 (N.D. Cal. 1978), without any discussion of the case, the Court there agreed to exercise its jurisdiction over the cause of action only after specifically finding that "the unique factual circumstances of this case suggest that any decision by this court is not likely to have significant precedential value or upset any particular scheme of regulation." 461 F.Supp. 264. It should be sufficient to point out that the Court merely ruled that a motion to dismiss was not appropriate because whether a taking occurred was essentially a factual question.

Petitioners also rely on Hotel Coamo Springs, Inc. v. Hernandez Colon, 426 F. Supp. 664 (D.P.R. 1976), as a basis for their claim that an improper exercise of

the zoning power constitutes a taking of their property without just compensation. This ignores the statement of the Court at page 674 that it is not faced with the problem of an improper use of the zoning power because the Commonwealth of Puerto Rico had filed condemnation proceedings. The case is only relevant to the extent of compensation required in an admitted condemnation case.

Gordon v. City of Warren, 579 F.2d 386 (1978), is another pre-condemnation case. The City attempted to use zoning power to prevent an owner's use of land that it intended to later condemn for a street right-of-way. Supra, at 387.

Finally, in Brock v. City of Davis, 401 F.Supp. 354 (N.D.C. 1975) and in Dahl v. City of Palo Alto, 372 F.Supp. 647 (N.D.C. 1974), as in Barbaccia, supra, the issue was whether motions to dismiss were proper. The courts held

that the property owners had the right to present evidence to prove their allegations. In the present case the property owners were not faced with motions to dismiss and were afforded the right to present evidence as to whether the actions of the government went beyond the zoning power and entered the domain of appropriation to public purpose which required compensation. They failed to present such evidence.

Thus Petitioners' statement that the Arizona Court of Appeals' ruling is contrary to established federal constitutional law is not supported by any of the cases cited by Petitioners. The relief granted by the Arizona Court is the proper remedy applicable to the facts of the case.

2. The Fifth and Fourteenth Amendments Do Not Compel an Award of Damages Where the Lower Court Has Found a "Taking" of Property.

Petitioners rely upon an analysis of Penn Central, supra, to argue that

there must be an award of damages where all reasonable use has been prohibited and the regulation is unsupported by public purpose. Such a rule would compel payment by taxpayers of compensation in the great majority of zoning invalidity cases. Other reasons why Penn Central does not support Petitioners have been discussed in Argument 1.

Although Petitioners do not rely on state court precedents in their petition, those opinions are helpful in learning from the long experience of the states in applying both the federal and state constitutional provisions providing for inverse condemnation. The Supreme Court of California in Agins v. City of Tiburon, supra, at page 227 stated:

> Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional 'taking of [plaintiffs'] property without payment of just compensation' for which an action

> in inverse condemnation will lie. Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available. This conclusion is supported by a leading authority (1 Nichols, Eminent Domain (3d rev.ed. 1975) Nature and Origin of Power, § 1.42(1), pp. 116-121), who expresses his view in this manner: 'Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid

> exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of the power of eminent domain since no provision is made for compensation. [Emphasis added by court]

Accord: HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237, 125 Cal.Rptr. 365 (1975) cert. denied, 425 U.S. 904 (1976); Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381 (1976), 385 N.Y.S.2d 5; Gold Run, Ltd. v. Board of County Commissioners, 554 P.2d 317 (Colo.App. 1976); Mailman Development Corporation v. City of Hollywood, 286 So.2d 614 (Fla.App. 1973), cert. denied, 419 U.S. 844 (1974).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should not issue to review the Judgment and Opinion of the Arizona

Court of Appeals.

Respectfully submitted,

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